Public Bank Bhd v Anuar Hong & Ong

HIGH COURT (SHAH ALAM) — CIVIL APPEAL NO MT3–11–55 OF 1999
ZALEHA ZAHARI J
14 DECEMBER 2004

Banking — Banker and customer — Duty of care — Forged signatures in cheques — Duty not to facilitate fraud — Whether plaintiff exercised due care in protecting own interest from misconduct by employee

Banking — Banker and customer — Duty of customer — Customer required to verify accuracy in banking statements and inform bank of discrepancy — Customer failed to notify bank of discrepancy — Whether plaintiff deemed to have accepted entries made in statement as final and conclusive

Banking — Cheque — Forged cheques — Duty not to facilitate fraud — Whether plaintiff lax in supervising own financial affairs

The plaintiff maintained two current accounts with the defendant bank. By a writ of summons filed against the defendant, the plaintiff claimed that the defendant had wrongfully allowed the encashment of 34 cheques from its current accounts. The plaintiff's clerk, SP3, had forged the signatures in the cheques. SP3 had been charged for criminal breach of trust and convicted.

The magistrate entered judgment against the defendant in the sum claimed amounting to RM19,000 with interest. This was the defendant's appeal.

Held, allowing the defendant's appeal:

(1) Based on the evidence of the plaintiff's witnesses, including SP3, the learned magistrate was correct in holding that the plaintiff had discharged the burden of proving that the signatures in the cheques were forged (see para 15).

(2) The plaintiff owed a duty not to facilitate fraud. In the instant case, the plaintiff appeared to have been rather lax in exercising supervision over its financial affairs. The plaintiff had clearly failed to exercise due care in protecting their own interest from any misconduct by their employee (see para 18).

(3) The agreement governing the operation of the current account required the plaintiff to, *inter alia*, verify the accuracy in the banking statements and draw the defendant's attention to any error or discrepancy within a stipulated time. By reason of the plaintiff's failure to notify the defendant in writing within the prescribed period, the plaintiff was deemed to have

accepted the entries made in the statement as correct, binding, final and conclusive (see para 21).

[**Bahasa Malaysia summary**

Plaintif mempunyai dua akaun semasa dengan bank defendan. Melalui satu writ saman yang difailkan terhadap defendan, plaintif menuntut bahawa defendan telah salah dalam menunaikan 34 cek daripada akaun semasanya. Kerani bagi plaintif, SP3 telah memalsukan tandatangan dalam cek-cek tersebut. SP3 didakwa untuk pecah amanah jenayah dan telah disabitkan.

Majistret telah menjatuhkan penghakiman terhadap defendan dalam jumlah tertuntut berjumlah RM19,000 berserta faedah. Ini adalah rayuan defendan.

Diputuskan, membenarkan rayuan defendan:

(1) Berdasarkan keterangan saksi plaintif termasuk SP3, majistret yang arif betul dalam memutuskan bahawa plaintif telah membuktikan bahawa tandatangan dalam cek-cek itu telah dipalsukan (lihat perenggan 15).

(2) Plaintif mempunyai kewajipan untuk tidak menggalakkan fraud. Dalam kes ini, plaintif tidak prihatin dalam mengawal hal-hal kewangan. Plaintif jelas gagal untuk memberi perhatian sewajarnya untuk melindungi kepentingannya sendiri daripada salah laku pekerjanya (lihat perenggan 18).

(3) Perjanjian yang mengawal pengurusan akaun semasa memerlukan plaintif supaya *inter alia* memastikan ketepatan penyataan perbankan dan membawa kepada perhatian defendan kepada sebarang kesilapan atau kesalahan dalam masa yang ditetapkan. Atas sebab kegagalan plaintif untuk memaklumkan defendan secara bertulis pada masa yang ditetapkan, plaintif didapati telah menerima ketepatan penyataan sebagai betul, mengikat, terakhir dan muktamad (lihat perenggan 21).]

Notes

For cases on duty of customer in banking, see 1 *Mallal's Digest* (4th Ed, 2002 Reissue) paras 1602–1604.

For a case on forged cheques, see 1 *Mallal's Digest* (4th Ed, 2002 Reissue) para1780.

Appeal from: Civil Suit No 72–3345 of 1997 (Magistrates' Court, Shah Alam)

Vilasini (Allen & Gledhill) for the appellant.

Elni Azura (Anuar Hong & Ong) for the respondent.

Zaleha Zahari J:

[1] The appellant in this case carries out banking business. It has a branch at Damasara Utama. The respondent was a customer of the appellant having the following two current accounts ie:

(a) Account No 30792918–25 (hereinafter referred as 'the Office Account'); and

(b) Account No 30792985–36 (hereinafter referred to as 'the Client's Account').

[2] By writ of summons filed on 4 November 1997 the respondent claimed that between the period of February to May 1997 the appellant had wrongfully allowed the encashment of eight cheques from its Office Account amounting to RM4,000 and another 26 cheques from its Client's Account amounting to RM15,000 the details of which are as follows:

A The Office Account

No	Date	Cheque No	Amount
1	4 February 1997	987099	RM500
2	3 May 1997	987056	RM500
3	5 May 1997	987055	RM500
4	12 May 1997	987062	RM500
5	17 May 1997	987063	RM700
6	19 May 1997	987064	RM500
7	23 May 1997	987065	RM400
8	26 May 1997	987068	RM400
		Total:	RM4,000

A B The Client's Account

No	Date	Cheque No	Amount
1	18 February 1997	987045	RM600
2	27 February 1997	987005	RM500
3	4 March 1997	987006	RM400
4	10 March 1997	987007	RM500
5	14 March 1997	987009	RM400
6	17 March 1997	987010	RM500
7	19 March 1997	987011	RM400
8	20 March 1997	987012	RM300
9	24 March 1997	987014	RM500
10	25 March 1997	987015	RM300
11	26 March 1997	987018	RM800
12	27 March 1997	987020	RM200
13	2 April 1997	987024	RM500
14	2 April 1997	987023	RM700
15	3 April 1997	987026	RM600
16	5 April 1997	987028	RM700
17	7 April 1997	987029	RM500
18	9 April 1997	987033	RM600
19	12 April 1997	987035	RM500
20	12 April 1997	987034	RM500
21	14 April 1997	987036	RM2200

22	17 April 1997	987039	RM500
23	22 April 1997	987042	RM700
24	24 April 1997	987043	RM400
25	26 April 1997	987044	RM700
26	30 April 1997	987046	RM500
		Total	RM15,000

[3] The magistrate Shah Alam, by order dated 14 October 1999, after a full trial, entered judgment against the appellant in the sum claimed amounting to RM19,000 with interest at 8% per annum from 4 November 1997 to date of realisation and costs. Dissatisfied with the said decision the appellant lodged this appeal.

[4] On 1 November 2003 after hearing arguments and perusal of the appeal record I allowed the defendant's appeal with costs. My reasons are as follows:

ISSUES FOR DETERMINATION

[5] From the pleadings and arguments presented the following are the issues for determination:

(a) Whether the magistrate was right on the evidence presented before the court in holding that the respondent had conclusively proved that each and every one of the cheque in issue to be a forgery?

(b) If the answer to the first issue is positive, whether in all of the circumstances of this case, the appellant should be held liable in honoring each and every one of the said cheques?

(c) Whether the respondent was under a duty to maintain their cheque books in safe custody?

(d) Whether the respondent had on the facts of this case itself been negligent and therefore estopped from relying on the forged cheques?

(e) Whether on the facts of this case the respondent is deemed to have ratified payments of the cheques in issue by reason of their failure to notify the appellant of any objection to the monthly statements issued by the appellant to the respondent?

THE RESPONDENT'S CASE

[6] The record shows that the respondent's case rests on three witnesses, Lim Bee Ting, one of the respondent's partners (SP1), Hong Kim Piow also a partner in the respondent's firm (SP2) and lastly, one Monolesa bte Ranjan (SP3) who was the respondent's financial clerk at the material time in question.

[7] According to para 4 of the statement of claim the plaintiff claimed that SP3, had forged the signature of SP2, and that the appellant was wrong in debiting and honoring the respective amounts specified in the forged cheques from their accounts with the appellant.

[8] SP1 (the partner responsible for the affairs of the respondent's firm) was called to give evidence on this point. SP1 testified to discovering that SP3 had forged the signature of SP2 on 34 cheques (exhs 'P4' to 'P35') from the respondent's the Office and Client's Account maintained with the appellant; and that a total sum of RM19,000 had been withdrawn from these two accounts without authority.

[9] In cross examination SP1 testified that SP3 commenced work with the respondent's firm sometime in October 1996. He initially used to check the accounts weekly but subsequently reduced it to once every three to four months (p 394 appeal record).

[10] SP2 testified that the signature on cheques 'P4' to 'P35' were not his.

[11] As for the evidence SP3, she confessed to having forged and encashed the cheques in issue. In cross examination SP3 testified that she could not recall the exact dates when she signed the cheques nor could she recall the exact cheque numbers. Be that as it may, SP3 testified that she could identify the cheques concerned from her name on the cheque. In respect of the forgery which she committed, SP3 testified that she was charged for criminal breach of trust, found guilty and convicted, and sentenced to a year's imprisonment.

THE APPELLANT'S CASE

[12] The appellant denied liability. The appellant's contention was it was incumbent upon the respondent to prove each and every cheque to be a forgery and that on the evidence adduced before the trial court the respondent had failed to discharge the burden that lies upon them

[13] It was the appellant's case that, even if the court were to hold that respondent had proved the cheques in issue to be forged by SP3, the appellant should not be held liable for the following reasons:

(a) by reason of the fact that the cheques had been honored by the appellant bona fide in the normal course of business;

(b) by reason of the fact that the respondent were themselves negligent as they had, contrary to their contractual obligations to the appellant (ie clause 18 of rules and regulations governing the opening and operations of all current accounts with the bank pp 62–64 of the appeal record) failed to notify the appellant of the forgery committed having done so only on 11 August 1997;

(c) by reason of the fact that the loss sustained by the respondent had been contributed wholly or in part by their own negligence as particularised below:

(i) by neglecting to check the monthly statements for the months of February to May 1997;

(ii) by failing to supervise and keeping their cheque books in a safe place;

(iii) by failing to enquire into the loss the cheques; and

(iv) by failing to supervise their clerk.

FINDINGS

[14] On the issue of whether the signature of SP2's signature on the cheques in issue were forgeries, the magistrate was satisfied that the respondent had discharged the burden that lies on them.

[15] On this point I hold that based on the evidence of SP1, SP2 and SP3 the learned magistrate was right in holding that the respondent had discharged the burden in proving the cheques in issue to be forged. Be that as it may I am of the view that the magistrate had erred in entering judgment against the respondent for the following reasons.

[16] Whether or not the respondent were themselves in breach of their duty of care owed to the appellant in contract or in tort, is a question of fact having regard to all of the circumstances of the case.

[17] The relationship between a bank and an account holder carries with it the obligation on the part of the bank to honour the customer's mandate as regards payment from the customer's account. The bank owes a duty of care to the customer to withhold payment where there has been fraudulent conduct.

[18] The customer clearly also owes a duty not to facilitate fraud. In the absence of express terms to the contrary the customer's duty in relation to forged cheques is limited to exercising due care in drawing cheque so as not to facilitate fraud or forgery.

[19] I am of the considered opinion that on the facts of the present case the respondent, as employer, appeared to have been rather lax in exercising its supervision in respect of its financial affairs. In my considered opinion to supervise their financial clerk SP3 only once in three months after the initial

period was inadequate. The respondent had clearly failed to exercise due care in protecting their own interest from any misconduct of their own employees.

[20] The customer clearly has a contractual duty to notify the bank of any unauthorised cheques of which they became aware.

[21] The appellant's counsel had laid stress on the respondent's failure to comply with the express provisions of the agreement governing the operation of the bank accounts between the parties. (exh 'D43(A)). Clause 3.1 requires the respondent to keep their cheque books in safe custody whilst cl 18 (p 64 appeal record) requires the respondent to scrutinize the accounts. It was submitted that had the respondent scrutinized their banking statements as envisaged by this clause the true character of the cheques in issue would have surfaced and loss been averted or minimised.

[22] I am in agreement with the appellant's counsel's submission that where there is an express provision for a customer to verify its accuracy within a specified period, it is incumbent upon a customer to check their bank records and statement and draw the bank's attention to any errors or discrepancy; the ordinary case of arithmetical errors, failure to credit sums to their account, of wrongful albeit innocent debit to an account.

[23] It is a waste of paper and effect if the only obligation of a customer, so to speak, is simply to file such accounts away without taking any trouble to read them and check their accuracy.

[24] The bank cannot reasonably be required with their own legitimate commercial pressure and concerns to attend to, be more vigilant in the respondent's interest than the respondent himself. A bank is dealing with hundreds or thousands of customers who have their own practices and habits. Bank officers come and go or go on leave and it is extremely onerous to impose on every officer a duty to communicate with every customer before they *bona fide* honour a cheque in the sums represented by the cheques in issue in this case. Notification of any error must be seen as being not only for the protection of the bank, but also for the protection of the customer.

[25] By reason of the respondent's failure to notify the bank in writing within the time prescribed of 14 days pursuant to cl 18, the respondent is accordingly deemed to have accepted such entries made up to the date of last entry, in the statement as 'correct, binding, final and conclusive and thereby adopts all cheques drawn thereon'.

[26] In this situation I am in agreement with the submission of the appellant's counsel that the respondent is to be estopped from relying on the forgery committed by their own employee and that they are deemed to have ratified the same.

[27] To sum up I hold:

(a) that the respondent had breached their contractual duty to prevent fraud;

(b) that it was the respondent's own carelessness which caused their loss; and

(c) that the appellant was not negligent in honoring the said cheques

[28] The appeal was accordingly allowed with costs.

Appeal allowed.

Reported by Lim Lee Na